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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1082

CINCINNATI DISTRICT COUNCIL 51, AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES, AFL-CIO, et al.,

Petitioners,

v.

CITY OF CINCINNATI,

Respondent,

and

MITCHELL B. GOLDBERG, A TAXPAYER,

Intervenor-Respondent.

BRIEF OF INTERVENOR-RESPONDENT OPPOSING CERTIORARI

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THE INTERVENOR-RESPONDENT IS THE TRUE RESPONDENT

The Intervenor-Respondent is a taxpayer of the City of Cincinnati who was permitted to intervene in all courts below in order "that the public interest will be better protected and justice will be furthered."

By virtue of the common law prohibition against strikes by public employees, the petitioners were by court orders

enjoined from striking against the City of Cincinnati. Nevertheless, the petitioners for 35 consecutive days (as found by the Ohio Supreme Court) continuously and repeatedly, deliberately and intentionally violated both a temporary restraining order and the permanent injunction of the Common Pleas Court below prohibiting the strike. They openly challenged the authority of that court and brazenly flouted its orders stating that they would continue their strike until they brought "the city to its knees". (225) * Each day the strike continued, the contempt of the court's orders was repeated. The garbage piled up until its stench and disease potential became intolerable; millions of gallons of raw sewage, for lack of employees at the treatment plants, were dumped into the Ohio River, endangering the health and lives of not only the citizens of Cincinnati, but all people down stream; the waterworks operation became perilously close to breaking down in spite of the valiant efforts and overtime of supervisors and outside contractors attempting to do the work of the striking employees; the public streets fell into worse and worse disrepair, and, the ice and snow remaining untreated and unremoved, the city streets in the winter season became more and more dangerous, all because of the strike; all the other functions of the city normally performed by non-uniformed personnel were grinding closer and closer to a halt.

During the strike the petitioners through their authorized agents, continuously and repeatedly flaunted their contempt of the court's orders by continuing the strike every

* Numbers in parenthesis refer to pages of the unprinted trial transcript, much of which was not printed below to save expense to the intervenor and his counsel, both of whom were acting without compensation. The letter R followed by a number, all in parenthesis, refers to a page in that portion of the record which was printed below.

day. Petitioners were not satisfied merely to be in contempt of court, but they further degraded the court by using their unrelenting, unmitigated, arrogant and repeated defiance of the lawful orders of the court for 35 days to coerce the city officials to yield to their demands. They thus used their very contempt of court as a weapon of coercion. The trial court in a companion case, *Goldberg* v. *Cincinnati,* in an unreported opinion held that the illegal strike had been used "to coerce" the city officials into paying the increased benefits demanded. The city officials were so thoroughly cowed that in submitting to the humiliating demands of petitioners they were required to insult the trial court by requesting that the case be dismissed and that the repeated and continuous flagrant contempts be ignored. The spectacle of having a court, which had been courageous enough to order a halt to a defiance of law by very powerful organizations, being asked to submit to the debasing indignity of permitting such orders to be flouted with impunity is intolerable in a society where the law is supposed to be supreme. As Mr. Justice Frankfurter stated in his concurring opinion in *United States* v. *United Mine Workers, et al,* 330 U.S. 258, 312 (1947), upholding large fines against John L. Lewis and the union for contempt of court:

> "There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny . . . *The greater the power that defies the law the less tolerant can this Court be of defiance*". (emphasis added)

The sole reason for the intervention of the intervenor-respondent in this case was to uphold the dignity of the court, to prevent increased disrespect for court orders and the law generally, and to protect the financial interest of the

taxpayers and citizens of Cincinnati, all of which the city officials were about to sacrifice under the coercive power of petitioners' threats of prolonging the crippling and illegal strike against the city. The intervenor is a lawyer, as of course is his counsel. As such they could not stand by and see the honor and respect due the courts disdainfully crushed under the heels of the contumacious petitioners who considered themselves above the law and by whom the city officials had become too intimidated to bring them to book. Someone had to prevent such further disgrace and insult to the court. Accordingly an application to intervene was filed under Section 733.581 of the Ohio Revised Code. (R. 17-18) Intervention was allowed under the statute because the court believed as provided therein "that the public interest will better protected and justice will be furthered". The Ohio Supreme Court upheld the intervention under Ohio law.

Intervenor and his counsel, in the spirit of the public service they were attempting to perform, waived all fees and compensation to which they might be entitled. (R. 20)

There is no doubt that the City, except for its initial show of courage at the inception of the strike, thereafter behaved in a thoroughly pusillanimous manner, and under the mounting coercive pressure of petitioners' contumacious defiance of the injunction did nothing to assist the court in seeing to it that its orders were complied with. Once the City officials had demonstrated their lack of courage in capitulating to petitioners' unlawful demands — unlawful because they were enforced by an illegal strike and contempt of court — the City officials naturally tried to justify themselves, and thereafter worked hand in glove with petitioners to try to frustrate not only the efforts of intervenor-respondent to uphold the dignity of the trial court and respect for its orders but also his efforts to obtain

for the citizens of Cincinnati restitution for what they had lost by reason of the violations of the court's orders.

Indeed in all the Ohio appellate courts and even in this Court instead of supporting the intervenor-respondent's position and the dignity of the trial court whose orders were so flagrantly violated, the City for political expediency has supported the contumacious petitioners. The Ohio Court of Appeals censured the City for such conduct. It called its brief "frivolous."

COUNTER-STATEMENT OF FACTS

Since petitioners' Statement of Facts is somewhat distorted and molded to try to support their arguments, intervenor-respondent finds it necessary to make a counter-statement of facts which will more accurately summarize the evidence and proceedings below.

On or about January 4, 1970 employees of the City of Cincinnati and members of defendant District Council No. 51 of the American Federation of State, County and Municipal Workers Union voted to strike and immediately went on strike in violation of the laws of Ohio. On the same day the City of Cincinnati in this case obtained a temporary restraining order which enjoined the strike on the basis of the common law prohibition against strikes by public employees. Within 24 hours the petitioner District Council notified its parent, the petitioner "International" in Washington of the strike (363), and the International thereafter sent their agents to support the strike (363). The temporary restraining order was completely ignored and flouted. On January 6, 1970 a permanent injunction was issued "restraining and enjoining the defendants from carrying on a strike" (R. 7) This permanent injunction was given even less respect than the temporary restraining

order, as the union leaders walked directly from the courtroom to the picket line and continued their strike in defiance of the permanent injunction (366). On January 7 the city brought contempt charges against some of the defendants, the court fined some and jailed others for a few days, and District Council 51 was fined $200.00 and posted a bond of $7,800.00.

The strike continued from January 4, 1970 to February 9, 1970 when the petitioners' members finally returned to work.

District Council 51's leaders managed the daily conduct of the strike (365) and the International's agents aided and abetted the strike and attempted to inflame the members into continued defiance of the court's orders (260-61, 235-36, 240). Both District Council leaders and the International representatives met with city officials to put pressure on the city to yield to appellants' demands (369). When the strike funds of the local union became exhausted, the International sent in $20,000.00 more from Washington to aid the strikers in continuing their contumacious flouting of the court's orders.

The International's representative, Epps, in an effort to put additional pressure on the city threatened to tie up the leading restaurants in the city during the busiest hours by having the strikers take all the seats and order just coffee, and to ruin the downtown clothing stores by having the strikers exclude regular customers by crowding into such stores and trying on clothes continuously (235-36, 240). When this was brought to the Common Pleas Court's attention, it supplemented the earlier permanent injunction by enjoining such conduct (236). This supplementary injunction was likewise defied. Under the instigation of the International's representative, Epps, a large group of strikers invaded the Stouffer's Inn restaurant just before lunch

time, ordered coffee and took up all of the unoccupied spaces so that regular customers could not be served (254). As the contumacious strike continued, on February 5, 1970 the city officials, being forced into submission by their fears of public chaos, panic and epidemics, yielded to the petitioners' demands, agreeing to pay increases which were demanded in consideration of the petitioners' ceasing their illegal strike and contempts of court. The strikers did not return to work until February 9, 1970 (297). The appellee-intervenor on February 6, 1970 filed its application to intervene (R.17). The Common Pleas Court held the matter in abeyance and granted the application on June 2, 1970. Thereafter, appellee-intervenor filed a motion for an order against the present petitioners, all the local unions, 33 individuals, and in addition two of the International's representatives, Epps and Brindza, to show cause why they should not be held in contempt for their conduct in furtherance of the illegal strike and why they should not be required to pay damages to the city for the losses incurred by reason of their contempt (R. 55). The Court issued an order to show cause pursuant to such motion, and, thereafter, in order to give defendants more notice, on August 25, 1970 reissued the order (R. 62).

In its judgment the trial court, at the suggestion of Intervenor's counsel, showed mercy to the individual contemnors and granted judgment only against the petitioners, the labor organizations who instigated and continued the strike.

The trial court found that the City had suffered provable damages in excess of $500,000 and millions more too difficult to prove in dollar amount, but that to enter judgment against petitioners in any amount that was really deserved would bankrupt petitioners which the court did not want to do. Hence the court decided to fine the petition-

ers in only a relatively nominal amount of $1,000 per day for each day of the strike or $37,000, the fine to cover both punishment and damages. In its desire to be lenient the court also credited against that total all fines and bonds paid in connection with previous contempt convictions of individual members, resulting in a net to the City of only $13,000.

Petitioners concede that the strike was supported by petitioner District Council 51 from its inception to its conclusion (Petitioner's Brief in the Ohio Supreme Court p. 8). Although petitioners admit that the International was called about the strike within 24 hours after it started (Id. p.9) they deny that it knew of the injunction or that it participated until much later. We have already shown that it would be reasonable to infer that the International was advised of the restraining order at least as soon as that same call. The record also shows that the representatives sent by the International from Washington to assist the local leaders visited local leaders who were jailed on January 7 for a few days for contempt of the court's injunction, and it was specifically acknowledged that such International representatives knew that the leaders on whom they called were in jail for violating the injunction (366).

Brindza, one of the International representatives sent from Washington, made a speech to union members on January 17, 1970, saying at (260):

> "Everything is breaking *our* way and looking rosy. They took away *your* leaders, they took away *your* pickets, they did not take away *your* soul, *we* have soul power. *We* haven't spent two weeks out for nothing. These three leaders didn't spend nine days in the workhouse for nothing". (emphasis added)

Brindza very well understood as is indicated from the quotation the difference between the first person pronoun

and second person pronouns. When Brindza used the word "we", referring to the two weeks prior to January 17, he identified the International with the strike from its inception.

Moreover, International representative Epps would not deny that he encouraged the employees to remain on strike (59-60). The record also showed in the testimony of others that Epps was a supporter of the strike (238). Indeed every union leader which the witness heard speak to the members, including Epps, supported the strike (246). The witness further testified that the union leaders "were resolute in the strike" and "that they were going to carry on until they got what they wanted" (225). It was further testified that Epps had stated that the workers would go into the good restaurants, have coffee during the lunch hour, occupy all available tables, and would go into the clothing stores and try on clothes (235, 236, 239, 254).

Van Hagen admitted that the International's representatives were present at various meetings with the city officials endeavoring to get the city to yield to the appellants' demands (367-369). Also, it is admitted that the International contributed $20,000.00 to the strike funds when the local money ran out. Petitioners' counsel tries to claim that this $20,000.00 was not in support of the strike, but was only motivated by eleemosynary considerations similar to "care packages" to the victims of the Nicaraguan earthquake. Although there is no doubt that petitioners' counsel is a very brave man, it is astonishing that he could be so audacious as to make so hypocritically cynical an assertion.

Thus it is plain that the International supported the strike in violation of the trial court's restraining order and injunction from beginning to end.

Petitioners claim there was no evidence of strike activity after February 5, 1970 when the city surrendered to the

union's demands. The fact, however, is that the employees did not return to work until the 9th of February. If the appellants did not get the employees back to work until the 9th even though an agreement was reached on the 5th, the strike effectively continued and the damage to the City continued, until the employees returned to work on February 9th, so the petitioners may be held responsible for that time as well. As experienced labor organizations, the petitioners would have to know that this would be a reasonable consequence of their acts. The law charges everyone with the reasonable consequences of his own conduct.

ARGUMENT

I.

THIS IS NOT A CASE FOR CERTIORARI. THERE IS NOTHING NOVEL OR OF SPECIAL IMPORTANCE IN THIS CASE

This case is nothing more than an open and shut contempt case involving primarily factual matters which were in the domain of the trial judge below as the trier of fact. The legal points raised by petitioners have been decided time and again against their contentions, and raise no novel or unique questions of law or of general importance. Indeed, the trial court's judgment was affirmed by the Court of Appeals and the Supreme Court of Ohio, who analyzed the identical issues raised by petitioners herein and found against them.

The trial court heard all of the evidence and testimony concerning the violation and decided as a matter of fact that petitioners continuously violated the permanent in-

junction. The trial court proceeded to impose penalties and assess damages and restitution to the prime injured party, the City of Cincinnati. The penalties and damages were well within the framework of the law and there was no abuse of discretion. Moreover, the evidence established that the penalties imposed and the order of restitution or damages was far less than the possible penalties and damages that could have been assessed under the law. This case, therefore, is no different from the thousands of contempt cases on the dockets of the courts throughout the United States each day. While this case was on a somewhat larger scale than some, the principles of law remain the same.

The claimed constitutional issues raised by petitioners when analyzed simply involve rehashing basic legal points that have been decided time and again as being constitutionally valid. The due process requirements raised by petitioners are not disputed by the intervenor or by the courts below, but were not violated here. The cases cited by petitioners merely state that due process requires that they be notified with reasonable specificity of the charge against them in order that they may prepare their defense. All of the courts below found that factually these requirements were met. As shown *infra* the action below simply followed the pattern of similar cases where there is continuing contempt of an order proscribing a general course of conduct. Petitioners have cited no case to the contrary.

Petitioners parenthetically raise the claim of a right to a jury trial in contempt cases. The law is well settled that there is no right to a jury in contempt actions for violation of injunctions because of the equitable nature of the proceedings. The contempt arises out of the violation of an order in equity. The purpose of civil contempt proceedings is to secure the dignity of the courts and the uninter-

rupted and unimpeded administration of justice. *Windham Bank* v. *Tomaszczyk*, 27 Ohio St. 2d 55, 58 (1971). The primary purpose, therefore, is to enforce equity and is not the recovery of money only, or specific real or personal property (the Ohio statutory requirements for jury trial which expanded the right to trial by jury as set forth in the Ohio Constitution). Any damages that are awarded by the court are for the purpose of granting full remedial relief to the party injured by the violation and are merely ancillary to the main relief sought. To require jury trials in equity cases would ignore age old legal precedents which go back to the common law of England.

II

A CHARGE OF CONTEMPT WHICH ALLEGES A CONTINUOUS VIOLATION OF A COURT ORDER, IN THIS CASE THE MAINTENANCE AND SUPPORT OF AN ILLEGAL STRIKE WHICH WAS ENJOINED, IS EQUIVALENT IN LEGAL EFFECT TO A CHARGE OF SEPARATE CONTEMPTS FOR EACH DAY THE INJUNCTION IS VIOLATED

No one disputes the proposition that due process requires that a defendant charged with contempt be advised with what he is charged. No one quarrels with the cases to that effect cited by Petitioners, but all this is just a false straw man issue in the case at bar.

The trial court in this case issued a permanent injunction "restraining and enjoining the defendants from carrying on a strike." (R. 7). This was a case where the actual strike itself was enjoined instead of particular actions such as mass picketing, violence, blocking of entrances, or the

like. In the latter cases, a contempt charge, in order to comply with constitutional requirements of due process, would have to allege with specificity the committing of the particular violations which were enjoined, such as the time, place and description of the examples of violence, in order that the alleged violator be notified of the charges against him and so that he can adequately prepare his defense.

Such was not the situation, however, in the case at bar. The petitioners were not enjoined from or charged with specific, separately identifiable acts; they were enjoined from maintaining a continous course of affirmative general conduct, i.e. "carrying on a strike". Petitioners have conceded below that they were charged with a continuous course of contempt of court over the entire period of the strike. (Petitioners' Brief to the Supreme Court of Ohio p. 17.) Obviously then, when they are charged with a continuous violation and continuous contempt throughout the entire period of the strike (35 days as found by the Supreme Court of Ohio) the charge necessarily accuses them of violating the court's order every minute, every hour and every day during the period. The only reasonable interpretation of the charge put them on notice that they were being charged with certainly no less than a violation and a contempt of the court's order each and every day of the strike.

Courts at common law historically have divided continuous extended periods of time into days as the shortest divisible period, and the legal adage is well recognized that "the law knows no fraction of the day." *11 Words and Phrases,* Day p. 179 (1971). See also *Greulich* v. *Monnin,* 142 Ohio St. 113, 50 N.E. 2d 310 (1943); *Kuznitsky* v. *Murphy,* 381 Ill. 182, 44 N.E. 2d 893 (1942).

The trial court below, therefore, looked upon the continuous violation of the injunction as separate contempts

each day the violation continued. This has been the practice used by almost every court faced with such a continuous violation of an order enjoining a general course of conduct. For example, this Court has ordered that the City of New York pay $5,000.00 per day until it complied with the order to cease polluting the ocean, shores and beaches of New Jersey, the polluting being a continuous violation. *New Jersey* v. *City of New York,* 290 U.S. 237 (1933). In the famous *Meredith* cases, *Meredith* v. *Fair,* 313 F. 2d 532 and 313 F. 2d 534 (5th Cir. 1962) the court ordered Governor Barnett of Mississippi to pay a fine of $10,000.00 per day and his agent Paul B. Johnson, Jr. $5,000.00 per day for every day they failed to comply with the court's restraining orders. The Supreme Court of Massachusetts stated in *Commonwealth* v. *Town of Hudson,* 315 Mass. 335, 347, 52 N.E. 2d 566, 574 (1943):

> "Where the duty to perform the decree continues and performance remains possible it is hard to see why repeated penalties may not be imposed for failure to obey during successive periods of time. (cases cited)"

There are relatively few reported cases where the court as in this case, fixed the penalty or damages after the violation had terminated. This is because in the usual case the plaintiff (in this case the City of Cincinnati) will see to it that the punishment is fixed in advance so as to prevent the continuous violation. However, in all of the reported cases where the issue was subsequently presented to the court after the violation had terminated, the court held retrospectively also that each day the violation continued constituted a contempt of court.

In *Madden* v. *Grain Elevator, Flour & Feed Mill Workers,* 334 F. 2d 1014 (7th Cir. 1964), the regional director of the N.L.R.B. sought injunctive relief against a union for

committing a secondary boycott. A restraining order was issued and subsequently violated. The court found contempt and fined the union $100.00 per day retroactively, 334 F.2d at 1017. Later when the union continued to flout the court order the fine was raised first to $500.00 per day *nunc pro tunc* and then to $3,000.00 per day, prospectively.

To the same effect, see *Solono Aquatic Club* v. *Superior Court of Solono County,* 165 Cal. 278, 131 P. 874 (Cal. Sup.Ct. 1913), wherein the defendant continued to operate its ferry service in violation of restraining order for three days. Each day was treated as a separate contempt. See also, *Hickinbotham* v. *Williams,* 228 Ark. 46, 305 S.W. 2d 841 (1957) where defendant who was enjoined from operating his store on Sundays continued in violation of court injunction to operate for 32 successive Sundays. The court held:

> "Each violation, of course, constituted contempt. To hold otherwise would have the effect of saying that once an order had been disregarded, it could thereafter be violated with impunity, and punishment rendered only for the original violation. Petitioner's argument is patently unsound." 228 Ark. at 50-51, 305 S.W. 2d at 843-44.

III

A CHARGE WHICH ALLEGES A CONTINUOUS COURSE OF CONDUCT EXISTING OVER SUCCESSIVE DAYS IS ALL THAT IS REQUIRED TO MEET THE DUE PROCESS REQUIREMENTS OF SPECIFICITY.

Since it was the illegal strike itself which was enjoined by the trial court and since the charge was that the petitioners supported and continued the strike from beginning

to end, there was no occasion to specify any particular acts of the petitioners in violation of the injunction. As stated above, this was not a case of an injunction against mass picketing or violence where allegations of specific acts are required to prove contempt. The continuation of the strike was itself a violation, and every day the strike continued was a further violation of the injunction. At the very outset of trial, counsel for petitioners were so advised. Intervenor's counsel pointed out to the trial court, in answer to petitioners' oral motion for further specification, that since a continuous course of contumacious conduct from beginning to end of the strike was charged, further specification of particular acts might have taken away from the continuing nature of the charge and was wholly unnecessary (R. 18). It did not have to be shown what specific acts the petitioners did each and every day; but merely that they did not discontinue the strike as required by the injunction.

Petitioners have conceded that District Council 51 supported the strike from beginning to end. Furthermore, the evidence was overwhelming, and the trial court so found from the evidence, that the International likewise supported the strike from beginning to end. Once the strike was started, the violation continued and was repeated each day until the strike was stopped. Affirmative action by petitioners was required to end the strike just as in *United States* v. *United Mine Workers of America,* 330 U.S. 258 (1947). Further specification was not required.

IV

PETITIONERS WERE NOT PREJUDICED EVEN IF THEIR CONDUCT WERE TREATED AS ONLY ONE CONTEMPT EXTENDING OVER THE ENTIRE PERIOD RATHER THAN SEPARATE CONTEMPTS EACH DAY.

Courts have the inherent right to punish for violation of their orders, which right cannot be limited by the legislature under Ohio law. The Supreme Court of Ohio below so held (p. 12a of Petitioners' Petition), following *State* v. *Local Union 5760,* 172 Ohio St. 75, 173 N.E. 2d 331 (1961). Consequently, the court had the right to impose a fine and damages in the total amount which it did impose, even if the petitioners' conduct be considered as if it were only one contempt. Such a punishment would have been reasonable since the course of conduct was the same insofar as petitioners' actions were concerned whether it be called one continuous violation over the period of the strike or separate violations for each day. Each of the separate contempts were the same as the others, i.e., that the petitioners conducted a strike in violation of the permanent injunction. (Opinion of the Ohio Supreme Court p. 7a of Petitioners' Petition in this Court). Hence petitioners could not possibly have been prejudiced.

Never have petitioners articulated in what particulars they were claiming to have been prejudiced. Their defense could not have been affected. Since they knew they were charged with violating the injunction continuously each and every day, expressly calling each day a separate contempt could not change the facts or enable them to put up any different defense. Moreover, District Council 51 admits that it supported the strike from its inception

to its conclusion (p. 15 of Petitioners Petition) so its guilt every day is admitted. The evidence as found by the trial court established that the International likewise participated from beginning to end. At no time did the International attempt to show the contrary in their case; so it likewise could not have been prejudiced.

It is true that the petitioners did not have notice of what the final penalty or damages would be, but no one knows in advance what penalty or damages a court will impose. That is up to the court. They did have notice (as shown above) when they were charged with having continuously violated the court's order that they were subject to being held in contempt for each day their violations continued.

CONCLUSION

Petitioners have shown no ground for certiorari. This is just a run of the mine contempt case involving continuous violation of a court order prohibiting a general course of conduct, and this case simply followed the usage in such cases.

Petitioners received a fair hearing which conformed in every respect to the requirements of due process of law. They were duly notified of the charge against them; they were given a full opportunity to prepare their defense, call witnesses in their behalf and present evidence; through their unusually able legal counsel they took advantage of every possible benefit allowed by law. The continuous contempts, however, in this case were so blatant and outrageous that no trier of fact could have found in their favor. The trial court imposed penalties and damages which were not only within the confines of the law but

minimal in the light of the aggravated contempt and tremendous damages suffered by the City and its citizens.

It is for all the above mentioned reasons that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Intervenor-Respondent

Of Counsel:

MITCHELL B. GOLDBERG

APPENDIX A

Section 733.581 of The Ohio Revised Code

If the city solicitor, upon the written request of any taxpayer of the municipal corporation, makes any application provided for by sections 733.56, 733.57, or 733.58 of the Revised Code, such taxpayer may be named as a party defendant and if so named shall have the right to assist in presenting all issues of law and fact to the court in order that a full and complete adjudication of the controversy may be had.

In any civil action or proceeding involving the public interest the court shall grant the application of any person to intervene if the court believes that the public interest will be better protected or justice will be further.